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Federal Communications Commission
Office of Secretary

Before The
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Advanced Television Systems	)	MM Docket No. 87-268
and Their Impact Upon the	)	
Existing Television Broadcast	)	
Service	)	

To: The Commission

JOINT PETITION FOR PARTIAL RECONSIDERATION

Cornerstone TeleVision, Inc. ("Cornerstone"), licensee of Station WPCB-TV, NTSC Channel 40, Greensburg, Pennsylvania and the proposed assignee of Station WQEX(TV), NTSC Channel *16, Pittsburgh, Pennsylvania, and WQED Pittsburgh ("WQED"), licensee of Station WQEX(TV), Pittsburgh, Pennsylvania, by their respective counsel, hereby jointly petition for reconsideration of the *Sixth Report and Order* in MM Docket No. 87-268, FCC 97-115 (released April 21, 1997) (*"Sixth R&O"*), insofar as the *Sixth R&O* addresses treatment of pending construction permits for station upgrades.[1/]

1/ In view of the Commission's and Broadcasters Caucus proposals, and in recognition of the fact that the Commission and the broadcasting industry urged that individual broadcasters not file separate comments, Cornerstone and WQED saw no necessity to participate in the proceeding earlier on an individual basis. Cornerstone and WQED did participate, however, in the form of comments filed on their behalf. For example, comments were filed on Cornerstone's behalf by the National Religious Broadcasters (NRB) and comments were filed on WQED's behalf by the Public Broadcasting Service and Association of America's Public Television Stations. Therefore, the requirements of Section 1.429 of the Rules with respect to petitions for reconsideration should be deemed satisfied. If necessary, however, Cornerstone and WQED request waiver of Section 1.429 to the extent necessary for the Commission to consider its petition, in view of the public interest issues raised herein.

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INTRODUCTION

Both Cornerstone and WQED have pending applications to upgrade their respective TV stations. Cornerstone is the current licensee of Station WPCB-TV, Channel 40, Greensburg, Pennsylvania, which has a pending application in FCC File No. BPCT-960722KE.[2/] WQED is the current licensee of Station WQEX(TV), Channel *16, Pittsburgh, Pennsylvania, which has pending applications to upgrade the station facilities on file with the Commission.[3/] Moreover, Cornerstone and WQED, along with a subsidiary of Paxson Communications Corporation, are parties to a three-way, three-party transaction involving two stations in the Pittsburgh area -- Station WPCB-TV and Station WQEX(TV) --- and are prosecuting an assignment application seeking FCC consent for the assignment of the license for Station WQEX(TV), Channel 16, from WQED to Cornerstone. FCC File No. BALET-970602IA. Thus, Cornerstone and WQED have a shared, vital interest in ensuring that their pending applications to upgrade their TV facilities receive the maximum protection to which they are entitled in the future DTV environment.

Cornerstone and WQED are aware that other parties are seeking reconsideration on similar issues regarding treatment of pending TV upgrade applications. For example, Cornerstone and WQED are aware that Paxson Communications Corporation and other parties ("Petitioners") are commenting on this exact same issue. To avoid duplication of efforts and

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2/ This application was filed on July 22, 1996 on FCC Form 340. The application seeks to increase the effective radiated power (upgrading power to 5,000 kilowatts) to change the antenna system to accommodate the higher power, and to slightly modify the geographical coordinates.

3/ These are: (1) an application filed April 12, 1996 on FCC Form 301 to change the antenna system and increase the effective radiated power of station WQEX at its existing site (BPET-960412KF, amended July 17, 1996); and (2) an application filed July 17, 1996 on FCC Form 301 to relocate station WQEX to the site utilized by Cornerstone TeleVision, Inc. ("Cornerstone") and to increase the station's effective radiated power.

conserve Commission resources, Cornerstone and WQED incorporate by reference Section IV of Petitioners Comments (excerpted in Attachment A) which addresses the issue of pending TV upgrade applications. Cornerstone and WQED have read this portion of Petitioner's comments and support it fully. Cornerstone and WQED respectfully urge the Commission to reconsider the *Sixth R&O* with respect to treatment of pending TV upgrade applications as expressed in the Comments of Petitioners.

Respectfully submitted,

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June 13, 1997

ATTACHMENT A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Advanced Television Systems and	)	MM Docket No. 87-268
Their Impact Upon the Existing	)	
Television Broadcast Service	)	
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To: The Commission	)	

PETITION FOR RECONSIDERATION

PAXSON COMMUNICATIONS CORPORATION
THE CHRISTIAN NETWORK, INC.
ROBERTS BROADCASTING COMPANY
MINORITY BROADCASTERS OF SANTA FE, INC.
COCOLA BROADCASTING COMPANIES
DP MEDIA OF MARTINSBURG, INC.

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June 13, 1997

IV. DTV Allocations for Pending Construction Permit Applications.

In the *Sixth R&O*, the FCC obliquely addresses the issue of DTV allocations for television licensees or permittees with pending construction permit applications. The *Sixth R&O* did not directly state whether the DTV Table of Allotments reflected existing or granted NTSC parameters in the case where a construction permit for modification of an existing station has been granted, but Appendix B, Table 2 in the *Sixth R&O* listed the coordinates proposed for each DTV station and, thus, provided an avenue for determining which set of coordinates was referenced by the FCC.

In the *Sixth R&O*, the FCC noted that "we stated [in the *Sixth Further Notice*] that we would continue to permit the filing of applications by existing or authorized NTSC television stations to modify their technical facilities, i.e., maximum effective radiated power (ERP), antenna height above average terrain (HAAT), and transmitter locations. However, in order to preserve our ability to develop the DTV Table, we stated that we would henceforth condition the grant of applications for modifications of technical facilities, including those for applications on file before the date of adoption of the *Sixth Further Notice* (i.e., July 25, 1996) but granted, after that date, on the outcome of our final decision on the DTV Table of Allotments."

In the *Sixth R&O*, the FCC concluded that it had been able to accommodate all eligible broadcasters with DTV allotments that would not conflict with any of the authorizations to modify existing NTSC facilities that had been granted subsequent to

July 25, 1996 and it was, accordingly, removing the condition from such grants.[16/] While the FCC did not make it clear on what basis it had chosen to grant certain construction permit applications pending as of July 25, 1996, but not others, it indicated in its *Sixth R&O* that henceforth "we will consider any impact on DTV allotments in deciding whether to grant applications for modification of NTSC facilities."

The problem with this approach is that a significant number of licensees and permittees, including many associated with the Petitioners, that had construction permit applications **pending as of July 25, 1996**, did not have those applications granted prior to April 3, 1997, with the result that these pending applications remain at the mercy at the FCC's proposed DTV Table of Allotments and it is unclear when, if ever, these pending applications will be granted or under what conditions they will be granted.

Stations in which the Petitioners have an existing or potential future interest had 17 construction permit applications on file as of July 25, 1996, which had not been granted by the FCC by April 3, 1997 and which remain pending to date. Some of these applications had been filed up to one year prior to the adoption of the FCC's

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16/ The condition that was removed from these grants read as follows:

> Grant of this authorization is conditioned on the outcome of the digital television (DTV) rulemaking proceeding in MM Docket No. 87-268. To the extent that the station's Grade B contour or potential for causing interference is extended into new areas by this authorization, the Commission may require the facilities authorized herein to be reduced or modified.

Sixth Further Notice of Proposed Rulemaking and each of these 17 applications involves a substantial improvement in the station's broadcast facilities ranging from $1.2 to $2.8 million for each facility. A listing of those stations and applications is appended hereto as Attachment 3.

The FCC's decision unfairly prejudices those broadcasters who had applications pending on July 25, 1996, that were not granted prior to April 3, 1997 and it contravenes the FCC's long-standing policy of ensuring diversity and competition in the broadcast industry. The Commission's inconsistent action in this regard is contrary both to the dictates of the long-standing line of *Melody Music* cases and the Commission's obligation to treat similarly-situated applicants in a similar manner. Finally, it ignores the Commission's own recognition in the *Sixth Further Notice* that there should be different consequences for applications on file as of July 25, 1996 and those applications filed after that date.[17/]

A. Conditioning Approval of Pending TV Modification Applications on DTV Impact is Inequitable. The Commission's newly announced "DTV Impact" policy for reviewing and approving these pending construction permit applications is inequitable because broadcasters relied to their detriment on the Commission's practice over the past nine years of not conditioning approval of modification applications on the outcome of the DTV proceedings. The Commission did not give notice until its July 25, 1996 *Sixth Further Notice* that it intended to alter the modification approval process as it applied to applications on file by July 25, 1996 and this was a departure

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17/ *Sixth Further Notice* ¶63.

from previous notices in this proceeding.[18/] This proposal was contrary to the Commission's established practice to grandfather applicants and licensees not in compliance with newly announced rules and was widely opposed.[19/] Although the Commission had suggested this conditional grant policy in its *Further Notice*, it removed all such conditions on permits granted subsequent to July 25, 1996 in the *Sixth R&O*.

However, by now applying its DTV Impact policy to television modification applications **on file before July 25, 1996 but not yet granted**, the Commission has left broadcasters in a far worse position solely as a result of their wholly reasonable reliance on Commission's practices and procedures. The Supreme Court has recognized that "[t]he protection of reasonable reliance interests is not only a legitimate governmental objective; it provides an exceedingly persuasive justification."[20/] Moreover, the Commission has noted that the retroactive application

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18/ As a matter of fact, up until that time the Commission explicitly chose not to limit modifications to existing television broadcast operations. *Second Further Notice of Proposed Rule Making*, 7 FCC Rcd 5376, 5383 (1992).

19/ *See*, e.g., *Amendment of Sections 73.1125 and 73.1130 of the Commission's Rules*, 3 FCC Rcd 5024, 5025 (1988) (grandfathering the location of broadcasters' public files); *Deletion of Section 97.25(c) of the Amateur Rules*, 66 FCC 2d 1, 1 (1977) (grandfathering the right of a licensee to apply for the Amateur Extra Class license without examination); *Amendment of Part 76, Subpart J of the Commission's Rules and Regulations*, 53 FCC 2d 1102 (1975) (grandfathering broadcast-cable cross ownership); *Second Report and Order*, 50 FCC 2d 1046, 1074 (1975) (grandfathering broadcast-newspaper cross ownership).

20/ *Heckler v. Mathews*, 465 U.S. 728, 746 (1984).

of a procedure is inequitable and disruptive to business.[21/] Here, the disruption would be significant, affecting a discrete group of broadcasters, such as the Petitioners, who had expended time and funds in planning for their proposed facilities modifications.

Conditioning approval of such pending applications on DTV Impact also would be inequitable because such a policy would injure those broadcasters who had applications pending on the adoption date of the *Further Notice* and which were not granted by the Commission prior to April 3, 1997. The decision to apply retroactively this policy clearly has no impact on those broadcasters whose modification applications were approved prior to April 3, 1997. Future DTV broadcasters also will remain unaffected because future allotments will be adjusted to accommodate the modifications at issue. Again, even if the DTV Impact policy were to affect future DTV broadcasters, the Commission's common practice is to grandfather provisions that affect current but not future licensees.[22/] Consequently, based on the disproportionate impact the Commission's decision will have on licensees whose applications were pending on July 25, 1996, it is inequitable for the Commission to apply its DTV Impact policy to then pending applications.

Retroactive application of the DTV Impact policy serves only minimally the objectives the Commission cites in support of the policy. The Commission is concerned that if broadcasters make changes to their technical operations, DTV

21/ *Cf. Amendments of Parts 20 and 24 of the Commission's Rules*, 3 CR 433, 471 (1996); *CATV of Rockford, Inc.*, 38 FCC 2d 10, 15 (1972), *reconsideration denied*, 40 FCC 2d 493 (1973).

22/ *Supra* Note 2.

service area replications will be affected.[23/] However, processing only those applications already on file -- applications made without notice of a potential change in the approval process would not have adversely affected the Commission's goals. The number of pending applications is finite; once approved they will not affect the service area replications any more than the applications approved prior to April 3, 1997.[24/] In sum, the minimal benefits that may accrue from application of the DTV Impact policy **do not** outweigh the substantial adverse impact such an action would have on TV broadcasters.

B. The DTV Impact Policy Defeats the Commission's Goals. Longstanding goals of broadcast regulation have been to increase competition and diversity in programming,[25/] as well as to further economic growth and employment opportunities in the telecommunications industry.[26/] The Petitioners are planning to spend between $1.2 million and $2.7 million to upgrade the television transmission facilities of individual stations. With perhaps only FCC conditional approval, broadcasters like the Petitioners will be reluctant to invest this amount of capital to improve their facilities when the modifications may later be curtailed or eliminated. By contrast,

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23/ *Sixth Further Notice* ¶63.

24/ The Commission recognizes that the current DTV allotment will "unavoidably result in some degree of interference to both NTSC and DTV stations. Id. ¶40.

25/ *See*, e.g., *Multiple-Ownership of Standard, FM, and Television Stations*, 45 FCC 1476-77, *reconsideration denied*, 45 FCC 1728 (1964); *Telecommunications Act of 1996 Conference Report*, S. Rep. 104-230 at 172, 177-78 (Feb. 1, 1996).

26/ *Sixth Further Notice* ¶3.

with an unconditional modification approval, broadcasters would be more willing to make the kinds of capital improvements described above. Local economies would benefit from the investment of millions of dollars in upgrading transmission equipment. Improved transmission facilities also will allow broadcasters to serve larger audiences and allow for an increase in competition for local advertising revenue. By adopting its DTV Impact policy, communities where the Petitioners have modifications pending will be deprived of the benefits of improved facilities. It is counter-intuitive for the Commission to implement its DTV Impact policy based on the effect it has on the Commission's goals and the local communities where the Petitioners have pending modification applications.

C. Retroactive Application of the DTV Impact Policy Is Unconstitutional. Federal agencies such as the FCC are precluded from issuing a rule or policy that has a retroactive and unequal effect unless Congress has explicitly conferred the power on the agency to do so.[27/] The Commission's decision to apply its DTV Impact policy retroactively violates this prohibition.

The D.C. Circuit and the Commission have established five factors to be balanced in determining whether a new rule is being applied retroactively in violation of constitutional requirements:[28/] (1) whether the case is one of first impression; (2) whether the new rule is an abrupt departure from past practices or just an attempt to

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27/ *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988).

28/ *E.g.*, *Retail, Wholesale and Dep't Store Union, AFL-CIO v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972); *Adelphia Cable Partners, L.P.*, 2 CR 76, 82 (1995).

fill in a void in the law; (3) the extent of reliance on the former rule; (4) the burden retroactivity would impose; and (5) the statutory interest in applying the new rule despite reliance on the old one.

Under these factors the Commission's decision was retroactively applied. This is not a case of first impression because the Commission has long-established procedures for processing TV modification applications. The DTV Impact policy also is a significant departure from the Commission's past practices. As discussed above, the Commission had not previously conditioned approval of modifications on any DTV proceedings, nor had it given any notice until July 25, 1996 that it intended to alter the modification approval process in a way that would treat pending applications differently. In addition, the Commission commonly grandfathers applicants and licensees not in compliance with the newly announced rules. With regard to the third and fourth factors, broadcasters including PCC relied heavily on the Commission's previous practices and procedures, going to great expense to prepare for the approval of its pending applications. Finally, there is no statutory provision that directs the Commission to apply its DTV Impact policy to applications pending as of July 25, 1996 that were not granted as of April 3, 1997. Under this test retroactive application of the DTV Impact policy to pending applications is unconstitutional and must not be adopted.

Although the Commission may deny an application if it changes the substantive standards for approving an application such that the applicant is no

longer qualified,[29/] qualification is not at issue here. The DTV Impact policy is a procedural mechanism only.[30/] The Commission's proposal in the *Further Notice* did not change the substantive standards for approving or disapproving modification applications nor did it disqualify any of the applicants. In short, the Commission does not have the authority to apply its conditional approval policy on a retroactive basis.

The Commission must process all construction permit applications pending as of July 25, 1996 and grant them with full DTV replication of the requested NTSC facilities. This means protection for the power and coordinates specified in those applications. This application has already been followed with a number of pre-July 25, 1996 applications and should be followed for all such similarly-situated applications.

D. The Commission's Decision Violates *Melody Music, Inc.* The Commission's decision in its *Sixth R&O* to treat some modification applications pending as of July 25, 1996 differently from other modification applications pending on that same date violates the Court of Appeals directive in *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965). In the thirty years since *Melody Music*, the D.C. Circuit consistently has upheld the basic premise of similar treatment for similarly situated parties. *See*, e.g., *New Orleans Channel 20, Inc. v. FCC*, 830 F.2d 361,

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29/ *E.g.*, *United States v. Storer Broad. Co.*, 351 U.S. 192 (1956); *Hispanic Info. and Telecomm. Network, Inc. v. FCC*, 865 F.2d 1289 (D.C. Cir. 1989).

30/ *Sixth Further Notice* ¶63.

366 (D.C. Cir. 1987); *Public Media Center v. FCC*, 587 F.2d 1322, 1331 (D.C. Cir. 1978) and the Commission also has regularly recognized its obligations in this regard. *See Cosmopolitan Broadcasting Corp.*, 61 FCC 2d 257, 261-2 (1976); *KFPW Broadcasting Co.*, 47 FCC 2d 1090, 1095 (1974); *Channel 13 of Las Vegas, Inc.*, 37 FCC 2d 518, 522-23 (1972); *RCA Alaska Communications, Inc.*, 25 FCC 2d 939, 940 (1970); *Continental Broadcasting, Inc.*, 17 FCC 2d 485, 487-88 (1969), aff'd 439 F.2d 580 (1971).

V. Conclusion.

For the foregoing reasons, the Petitioners request that the Commission reconsider its decisions in the *Fifth R&O* and the *Sixth R&O* to the extent described above.

Respectfully submitted,

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THE CHRISTIAN NETWORK, INC.
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MINORITY BROADCASTERS OF SANTA FE, INC.
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